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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellant*

v.

UNITED STATES OF AMERICA

No. 63

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

On Appeals From the United States District Court for the District of Columbia

RESPONDING BRIEF FOR THE MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

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IN THE

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No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellant*

v.

UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

On Appeals From the United States District Court for the District of Columbia

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RESPONDING BRIEF FOR THE MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

On November 9, 1959, the Association and the United States filed briefs on the merits in these appeals. The Association's brief was devoted exclusively to the inapplicability of conventional antitrust enforcement to

farmer cooperatives when acting apart from combination or conspiracy with outsiders, the issue central to both appeals. In the present brief, the Association will respond in Part I to the Government's arguments predicated on ordinary and, we think, inapplicable antitrust standards; Part II will deal with the questions relating to relief raised by the Government on its cross-appeal in No. 73.

QUESTION PRESENTED RELATING TO RELIEF

In the event the Association is held by this Court to be accountable under the antitrust laws for the Embassy acquisition, the question presented by the cross-appeal in No. 73 will be whether the district court erred as a matter of law in rejecting additional judgment provisions proposed by the Government

(a) to require divestiture by the Association not only of "assets acquired" from Embassy Dairy, Inc. and "replacements therefor," but also of all later-acquired assets useful in, but not necessary for, the operation of the dairy;

(b) to prohibit the Association from engaging in the wholesale or retail distribution of milk pending divestiture (other than through Embassy) and for ten years thereafter;[1]

(c) to forbid the Association for twenty years[1] from acquiring any business engaged in the sale or

[1] In this Court, the Government has receded from its original position as to the duration of post-divestiture prohibitions against operating or acquiring a milk distributing business. It now suggests that the period of any ban against the Association's operating as a milk dealer "might appropriately be left to the district court to determine" (Gov. Br. 49), and that "five years might perhaps be appropriate" for the ban against acquisition of another milk business (Gov. Br. 51 n. 27).

distribution of milk without prior showing to the court that such acquisition would not substantially lessen competition or tend to create a monopoly; and

(d) to supplement the provisions for periodic reports by the Association and continuing jurisdiction by the court by granting the Government not only sweeping visitation privileges over the books, records and personnel of the Association, but also the right to require defendant to submit such written reports under oath as the Government might demand.

SUMMARY OF ARGUMENT

I. The Government's brief, written as if monopolization and vertical integration by an authorized Capper-Volstead cooperative monopoly can be tested by conventional antitrust standards, misconceives the legal status of farmer cooperatives, the record in this case, and the decisions of this Court.

A. The Government contends that the Capper-Volstead Act simply establishes that farmer cooperatives are to be treated on a "parity" with ordinary business corporations, yet it concedes that in several vital respects cooperatives may violate antitrust standards without incurring antitrust penalties. The "parity" theory starts to crumble when the Government admits, as it must, that farmers may band together without limit as to number or market share (Gov. Br. 14, 24-25). While, at first, the Government describes the resulting combination as a mere "colloquial" monopoly having only a "supply-control position" (*ibid.*), later it is forced to acknowledge that the Capper-Volstead Act "permits an agricultural asso-

ciation to obtain a degree of control over supply which, in the case of an ordinary corporation, might constitute unlawful monopolization" (Gov. Br. 32). While the Government does not so completely abandon its "parity" theory with respect to a producer cooperative's acquisition of retail outlets, it does acknowledge that a producer cooperative is authorized to extend its operations into distribution and marketing and is not limited to "building up its own dealer organization" but may for legitimate reasons even acquire "the assets and business of an existing dealer" (Gov. Br. 35, 38). The legality of such a vertical acquisition is said to depend on its purpose or effect, but the Government is unable to formulate any realistic or coherent standards. Thus, in some places the Government seems to take the position that a cooperative's acquisition of a dealer will be lawful or unlawful depending upon whether the acquired dealer had been its customer or the customer of competitors (Gov. Br. 39). Yet in its later arguments on relief (Gov. Br. 50) and in its earlier arguments on monopolization (Gov. Br. 20), it takes the more conventional antitrust position that the legality of vertical integration by a producer monopoly is not affected by any question as to who formerly supplied the acquired dealer.

The Government's attempt to maintain its "parity" theory of antitrust liability between cooperatives and ordinary corporations is in sharp contrast to its own argument 20 years ago in the *Rock Royal* case where it successfully urged this Court to recognize that a wealth of agricultural cooperative legislation had created "exemptions result[ing] in definite competitive advantages to such associations." Brief for the United States, page 137, *United States* v. *Rock Royal*

Co-op., 307 U.S. 533 (1939). We submit that the Government's hypothesis of antitrust parity cannot be maintained without disregarding the clear purpose of the Capper-Volstead Act and the long history of preferred treatment for agricultural cooperatives.

B. The Government next contends that monopolistic purpose or effect, not sanctioned by the Capper-Volstead Act, is demonstrated by the "excessive" purchase price paid for Embassy and the "substantial losses" incurred as a result of the acquisition. As a matter of cold fact, not disputed anywhere in the record, the evidence showed that federal agricultural agencies found the purchase price to be reasonable and that substantial operating profits inured to the Association's members as a result of the acquisition. The Baltimore Bank for Cooperatives, which financed the Embassy purchase, found as required by the Agricultural Marketing Act that the purchase price was "reasonable." It made this finding after the Farmer Cooperative Service of the Department of Agriculture had advised it that the high purchase price of Embassy as an ordinary dairy business was justified by the unique and substantial extra value to a cooperative of securing an outlet which would divert Class III surplus milk to Class I fluid uses, thereby substantially raising the returns to members. The Government's argument that the Association's purchase of Embassy resulted in a loss of almost 1½ million dollars in the first 2½ years (Gov. Br. 36 n. 17) is absolutely incredible in light of the fact that the data on which it is based was conceded on cross-examination by the Government witness who prepared it to have failed to take into account the movement of 16 to 18,000 gallons of milk daily from the Class III price of $3 to the

Class I price of $6.62 (R. 295, 576). The undisputed fact is that the Embassy acquisition resulted in a profit of several million dollars to the members of the Association (R. 360). A further value acquired by the Association was the seller's covenant not to compete in the market for ten years. This was not only a normal and lawful ancillary covenant but was specifically counselled by the Farmer Cooperative Service to be included when cooperatives purchased milk distributing businesses. The district court made no finding whatever reflecting on the reasonableness of the covenant. And although the acquisition eliminated Embassy Dairy as an outlet for the milk of independent producers, the Government conceded that all independents were welcome to join the Association (R. 137) and the testimony was undisputed that the Association was willing to, and did, buy milk from producers regardless of the fact that they were not members (R. 390). In any event, contrary to the contention of the Government, the legislative history of Capper-Volstead demonstrates that cooperatives are authorized to secure such control "that all other producers of that particular community will be obliged to leave the field."

C. Finally, the Government contends, contrary to its own jurisdictional statement in this case, that *United States* v. *Borden Co.*, 308 U.S. 188 (1939), involving conspiracy with outsiders, is "dispositive" of an antitrust case against a cooperative acting alone. Every decision of this Court denying the exemption of farmer cooperatives, and of labor unions, as well, has been predicated on the existence of conspiracy with and for the benefit of non-exempt parties. This Court has never denied exemption where the exempt organi-

zation restrained trade solely by its own activities and for its own benefit.

II. The Government urges that in the event this Court holds the Association to be subject to conventional antitrust enforcement, the judgment entered by the district court should be modified. The court's judgment affords appropriate and effective relief. The Association is ordered to dispose of Embassy "as a going dairy business"; pending divestiture the Association must administer the Embassy assets "in good faith," and must make periodic reports to the court on its efforts to effect the divestiture; and the court retained jurisdiction to enable either party to apply for such further orders as may be required for the full effectuation of the judgment. This Court has always recognized that "[t]he framing of decrees should take place in the District rather than in Appellate Courts," *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947), and it has been particularly reluctant to intervene where, as here, the district court has retained jurisdiction and is thus able "to take the necessary measures to cause the decree to be fully and faithfully carried out." *Associated Press* v. *United States*, 326 U.S. 1, 22 (1945).

The Government seeks four specific modifications of the district court's decree: (a) The Government contends that by failing to require divestiture of assets added to the Embassy operation, other than as replacements, the judgment may make it possible for the Association to divest an outmoded and competitively insignificant Embassy Dairy. The decree, however, requires divestiture of a "going dairy business" and its "good faith" requirement, particularly as explained by the court in the hearing on relief, provides assurance

that the Association will not be permitted to withhold assets essential to Embassy's continued operation as a competitively significant dairy business. (b) The Government also urges that the judgment should have prohibited the Association from operating any dairy other than Embassy pending divestiture and for an unspecified period thereafter. As the court made abundantly clear in the hearing on relief any attempt to siphon off the Embassy Dairy assets or customers to another dairy operated by the Association pending divestiture would be subject to the decree's "good faith" provisions. Insofar as this provision is aimed at any fancied post-divestiture dilution of Embassy, it would impose an absolute and unwarranted prohibition against the Association's re-entry into the milk distribution business, even though such re-entry might be essential to the marketing of its members' milk, and would in no way lessen competition or tend to monopoly. (c) The Government further contends that the Association should be prohibited for a period of years from acquiring any milk business in the Washington market without prior notice to the United States and without satisfying the court that the acquisition will not lessen competition or tend to monopoly. The Government advances no valid reason for interfering with the exercise of the district court's discretion in denying this relief. It gives no reason whatever for shifting the burden of proof, and, although it asserts that the present record "demonstrates the difficulty of undoing a consummated acquisition in the dairy business," it points to nothing in the record supporting this assertion. We submit that, in fact, the record demonstrates that the Association has operated Embassy as a separate division and, if the district court's order should be sustained, would be able to dispose of it as

a fully operating and competitively significant dairy business. (d) Finally, it is urged by the Government that the district court erred in refusing to confer broad visitation rights on the Government and to require the Association to furnish such written reports under oath as the Government might demand. While this Court has in appropriate cases upheld the grant of visitation rights, it has always deemed it to be a matter for the district court's discretion. Here there was no abuse of discretion. Moreover, this Court has expressly condemned provisions requiring the filing of written reports upon demand of the Department of Justice. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 728 (1944).

ARGUMENT

I. THE GOVERNMENT'S SUBSTANTIVE ARGUMENT MISCONCEIVES THE LEGAL STATUS OF FARMER COOPERATIVES, THE RECORD IN THIS CASE AND THE DECISIONS OF THIS COURT

A. The "Parity" Theory of the Capper-Volstead Act

The Government's basic position is that the Capper-Volstead Act did no more than place farmer cooperatives on a "parity" with ordinary "business corporations" (Gov. Br. 14, 15, 22). It frankly acknowledges that Capper-Volstead authorized farmers in a locality to band together without limit as to "number or proportion" and thereby "establish a monopoly" in the market (Gov. Br. 24). But the economic power and competitive implications of "this kind of 'monopoly'" (*ibid.*) are nowhere explored, and the innocent terminology by which the "monopoly" is characterized by the Government might lead the casual reader to believe that the Capper-Volstead Act created a new,

emasculated economic animal—a monopoly devoid of monopoly power. Thus a farmer cooperative "controlling the entire source of supply in a particular area" (Gov. Br. 25) is spoken of as possessing simply a "supply-control position" (Gov. Br. 14, 28). Such a cooperative, the Government says, obtains a monopoly only in the "colloquial sense" (Gov. Br. 25). No legal significance is to be attributed to it; it is a mere technicality. Even the Senate's rejection in 1922 of the Judiciary Committee's proposed antimonopoly amendment[2] to the bill which became the Capper-Volstead Act gives the Government no pause in its argument that Congress intended no more than to establish complete substantive and procedural antitrust "parity" between cooperatives and other corporations (Gov. Br. 24-25).

Two-thirds of the way through the Government's brief, however, the "parity" theory collapses. At page 32, the Government makes the inevitable concession to reality and acknowledges that the Capper-Volstead Act "permits an agricultural association to obtain a degree of control over supply which in the case of an ordinary corporation, might constitute unlawful monopolization" (Gov. Br. 32). Thus, the Government itself contradicts the only point made in its truncated discussion of legislative history, i.e. that certain paragraphs of House Report 24 of the 67th Congress, considered by themselves, contain language which implies full application of the antitrust laws to farmer co-

[2] The Government's off-hand interpretation and dismissal of this antimonopoly amendment in two sentences appears to have been drafted in complete oblivion of the wholly contrary meaning which the legislative history unmistakably discloses. Compare Gov. Br. 24-25 with Assn. Br. 53-57, App. 26a-47a.

operatives.[3] The balance of the brief will be searched in vain for any return to the notion of antitrust "parity" between cooperatives and corporations on the production level.

The residue of the Government's argument is devoted to the effort to maintain the "parity" theory with respect to vertical integration. The Government's point here is that this Court must reject any interpretation of the Capper-Volstead Act which confers upon a cooperative that "enters upon a field of distribution new to it" any "privilege to violate the antitrust laws denied to ordinary trading corporations" (Gov. Br. 37). The argument begins by limiting to the production level the prior concession regarding a cooperative's right of otherwise "unlawful monopolization"; no extension into distribution and marketing is to be countenanced (Gov. Br. 33). The Capper-Volstead Act, it is said, allows no use of a cooperative's monopoly position in production to beget monopoly in the "retail market" (*ibid.*). The "empire" in supply may not be extended by "exclusionary means" (*ibid.*).

But the firmness of of this argument begins to wilt two pages later when the Government acknowledges that an association "does not necessarily exceed the statutory authorization if, instead of gradually building up its own dealer organization, it acquires the assets and business of an existing dealer" (Gov. Br. 35, 38). The critical factor in such a case, suggests the Government, is not so much the effect of the acquisition as the cooperative's purpose in making it

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[3] For the true meaning of the House Report and the legislative history of Capper-Volstead considered in its entirety, see Assn. Br. 44-65, App. 7a-48a.

(Gov. Br. 37). Vertical integration by acquiring an independent dealer is assumed to be perfectly proper so long as the cooperative demonstrates either a "purpose to perform the function of distribution more efficiently than existing distributors" or a "purpose to share in the normal profits of the business of distribution" (Gov. Br. 38 n. 18). In such circumstances, the Government admits, an acquisition may well be "necessary" within the meaning of Section 1 of the Capper-Volstead Act, to "effectuate the collective-marketing purposes of a Capper-Volstead association" (Gov. Br. 38).

But this limited concession to the intended meaning of the Capper-Volstead Act is short-lived in the Government's brief. Regardless of whether or not acquisitions are "necessary" for collective marketing purposes, cooperative control of 86% of the milk supply in the market, previously passed off as a mere "supply-control position" or "colloquial" monopoly, is urged as requiring severe restraints on acquisitions of distribution facilities because "any additional engrossing of that market by the Association necessarily would pose a serious anti-competitive threat" (Gov. Br. 50). As so plainly stated by the Government to this Court earlier in this case:[4]

> Appellee's acquisition of any of the limited number of dairies operating in the Washington Metropolitan area, when appellee controls 86% of the fluid milk sold in that area, would give rise to at least dangerous probability of a violation of the antitrust laws. In these circumstances, absence of a pattern of past illegal conduct is not determinative.

[4] Brief in Opposition to Motion to Dismiss in Part, No. 73, page 6.

Such a view of vertical integration by a monopoly is not at all surprising. It is, after all, the only position consistent with conventional antitrust doctrine under the Government's sometime "parity" theory. But this position demonstrates strikingly the departure of the Government from its theory that the acquisition of Embassy was unlawful principally because Embassy had been the outlet for the milk of competitors, i.e. nonmembers of the Association (Gov. Br. 39). Ordinarily, the Government would never contend that the legality of a producer-monopoly's purchase of a distributor depended on whether or not, at the moment of acquisition, the dealer happened to be a customer of the monopoly. Any such acquisition would be said to affect competition, actual or potential. Thus, under any theory of antitrust "parity" between cooperatives and corporations, it is inconceivable that the Government—despite its repeated reliance on the "foreclosure" of nonmember producers—would concede that antitrust liability could have been avoided here had the Association, instead of acquiring Embassy, bought Chestnut Farms Dairy or some other substantial dealer in the market which at the time of acquisition was a 100% customer of the Association.

The Government's inability to maintain any antitrust distinction between a cooperative's purchase of distributors based on whether or not they purchased the cooperative's milk is illustrated by the record in this case. First, in prosecuting its unsuccessful Section 7 case (Gov. Br. 11 n. 9) against the Association's acquisition of the Richfield-Wakefield Dairy, an Association customer (Gov. Exh. 27, R. 573), the Government claimed that the purchase was motivated by a

desire to retain that dairy as an outlet for Association milk (R. 365-6). The Richfield-Wakefield allegation was also particularized under ¶ 22b of the Amended Complaint (R. 72) as a means by which the Association supposedly eliminated competing producers from the market in violation of Section 2 of the Sherman Act. The attack on this acquisition of a customer-dealer is by no means abandoned in this Court. The purchase of Richfield "to preclude it from being an outlet for milk supplied by others" (Gov. Br. 29) is relied on by the Government here in support of its charge of monopolization "beyond the ambit of any Capper-Volstead authorization" (Gov. Br. 31). Yet at the time of its purchase in December 1957, Richfield-Wakefield (then known as Wakefield) was a hopelessly failing corporation (Gov. Br. 11 n. 9; R. 495) which, in sharp contrast to Embassy, was then buying 100% of its milk from the Association (Gov. Exh. 120-J, R. 676).

Similarly, the Government sought to introduce into the Embassy trial evidence relating to an alleged unsuccessful attempt by the Association in 1954 to purchase Harvey Dairy, then also a 100% customer of the Association (Gov. Exh. 27, R. 573). Said Government counsel (R. 395):

> We want to show the Court that the Association sought to purchase Harvey to retain its business.

The district court excluded the showing as irrelevant (*ibid.*). The Harvey Dairy incident is also particularized as an unlawful attempt to monopolize under ¶ 22b and d of the Amended Complaint (R. 39, 40). At the time of the alleged offer, Harvey Dairy possessed, ac-

cording to the Government, only a 2.7% share of the market (Gov. Exh. 91, R. 632).[5]

The Government's uniform assault on the Association's transactions involving different dealers, differently situated, serves to illustrate how the antitrust laws could and would be used to attack the acquisition or attempted acquisition of any dealer by a farmer cooperative. If the dealer has been a customer of the cooperative's competitors, its acquisition is said to be vulnerable because it will "exclude competitors from the market" (Gov. Br. 39). If the dealer instead was the cooperative's own customer, its acquisition will be prosecuted on the ground that it will "preclude [the dealer] from being an outlet for milk supplied by others" (Gov. Br. 29).

The Government's sweeping demand for relief, embracing not only divestiture of the Association's sole fluid milk outlet but seeking to circumscribe future acquisitions as well (Gov. Br. 47-51), emphasizes the essential all-or-nothing thrust of its case: if the antitrust laws are applicable to the Association's acquisition of Embassy, they apply equally to all acquisitions of marketing outlets by farmer cooperatives. The alternative, urged in our principal brief, is that they do not apply at all, but are replaced by the Capper-Volstead Act.

When studied in its totality, the Government's brief refutes itself. Farmer cooperatives are to be treated on a "parity" with ordinary business corporations,

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[5] The eventual loss of Harvey Dairy on October 1, 1954, as a Class I outlet for Association milk was one of the factors that led the Department of Agriculture to issue the recent Federal Marketing Order No. 2 for the Washington area. 24 Fed. Reg. 3630, 3631 (1959).

except that cooperatives may monopolize in situations that would be unlawful for all others. Cooperatives may integrate vertically into retail marketing if "necessary" to carry out their purposes, except that when the cooperative is large—as admittedly it is authorized to be (Gov. Br. 24)—any such integration will "pose a serious anti-competitive threat" (Gov. Br. 50) and should therefore be enjoined. The distinctions the Government so carefully weaves in making one argument unravel promptly when it begins making another. The lines drawn by the Government on one page of its brief are erased by it on the next. "Purpose" is the test except where it proves to be innocent; in such cases "effect" will be controlling. Acquiring an outlet of competitors is "exclusion"; acquiring the cooperative's own customer is "preclusion." In the conventional administration of the antitrust laws such flexibility may be hornbook and proper; in the realm of lawful farmer cooperative monopolies authorized to integrate vertically, these flexible concepts could condemn all acquisitions and effectively repeal their authorizing statute.

In our view, the Government's inability to formulate a coherent theory to accommodate cooperatives and antitrust is the inevitable result of attempting to apply conventional competitive standards to an authorized monopoly. The Government's plight serves to emphasize the wisdom and demonstrate the need that prompted the 67th Congress in 1922 to establish Capper-Volstead as the exclusive standard and procedure for dealing with monopolistic conduct by farmer cooperatives when acting alone. Interestingly, the Association is not alone in disputing the notion of "parity" advanced by the Government in this case; that notion

has previously been repudiated by the Government itself. In 1939, in the course of successfully urging this Court to sustain privileged treatment of farmer cooperatives in the *Rock Royal* case, the Government relied on the exemptions and benefits which state and federal law already conferred on cooperatives. Its argument there was founded not on the theory that such laws place cooperatives on a "parity" with others, but that "such exemptions result in definite competitive advantages to such associations." Brief for the United States, page 137, *United States* v. *Rock Royal Co-op*, 307 U.S. 533 (1939). We believe the Government was right in 1939 and is wrong today.

B. The Government's "Excessive Purchase Price" Arguments

Completely ignoring the Association's unique status as a producer cooperative with surplus milk, and erroneously equating the Association with an ordinary distributor of milk, the Government seizes upon an isolated finding of the district court that the price paid by the Association was "far in excess of the actual and intrinsic value of the property purchased" (Gov. Br. 8, 9, 15, 36). Coupling this with shreds of evidence recited in such a way as to intimate that the post-acquisition operation of Embassy has resulted in "substantial operating losses" to the Association (Gov. Br. 36 n. 17), the Government leaps to the conclusion that it is "abundantly clear" that Embassy's purchase "was motivated by considerations other than a desire on the part of the Association that it secure for its members the profits incident to conducting the business of a dealer" (Gov. Br. 36). This conclusion, as well as the "facts" relied upon to reach it, reveal an astonishing misconception as to the financial considerations that

prompted the purchase of Embassy, the substantial direct financial benefits to the Association's farmer-members, and the careful appraisal and approval of the purchase price and anticipated benefits made by the Department of Agriculture and the Bank for Cooperatives. None of these matters is in dispute; they are in fact disclosed largely by official documents introduced into evidence by the Government itself.

The price paid by the Association for the acquisition of Embassy was found to be "reasonable" by the Baltimore Bank for Cooperatives. That finding, made pursuant to statute, has never been challenged, even though the Department of Justice was fully aware of it. In explaining to the Department, prior to trial, its loan of $2,100,000 to finance the Association's purchase, the Bank stated (Gov. Exh. 114, R. 657):

> . . . in approving this loan the Bank did comply with the provisions of 12 U.S.C. 1141 by making the necessary determination that the loan would be in furtherance of the policy declared by the Congress in 12 U.S.C. 1141a.

The Bank also quoted to the Department the provision of the Agricultural Marketing Act that precluded it from making a loan to a cooperative for the acquisition of physical facilities "unless the Governor of the Farm Credit Administration finds that the purchase price or rent to be paid is reasonable" (Gov. Exh. 114, R. 656; 12 U.S.C. §1141e (c)(2)). Finally, the Bank gave to the Department the loan agreement itself, which commenced by reciting that "The findings required by law having been duly made. . ." (Gov. Exh. 114, R. 659).

The Bank's finding of reasonableness was based on full knowledge of the competitive and financial implications of the purchase. Its report noted that despite the "very substantial profit" (Gov. Exh. 27, R. 574) which the owner of Embassy would reap from the sale, it seemed (*ibid.*, R. 576)

> reasonable to expect real, immediate financial benefits in substantial amounts by the diversion of some 20,000 gallons daily of the present Association surplus to Class I and II distribution through the Embassy plant and other handlers depending upon the Association for their milk supply.

The anticipated benefits to the Association's producers that seemed to the Bank to have "merit" ranged close to $2,000,000 annually (*ibid.*, R. 575-6).

The Bank's financial analysis rested in part on the study and conclusions of Donald E. Hirsch, Chief, Dairy Branch, Farmer Cooperative Service, Department of Agriculture (*ibid.*, R. 576). Hirsch noted that the purchase price was considerably above Embassy's market value as an ordinary dairy business (Def. Exh. 19, R. 711-12). But Hirsch went on to find that "market value" was an inadequate standard by which to measure purchase price when appraising Embassy's value to a farmer cooperative much of whose milk was then being disposed of as surplus at the low Class III price. He stated (*ibid.*, R. 715):

> The effect of the purchase on operation of the market-wide pool appears to justify paying in excess of the market value of the business.

His reason was clear (*ibid.*):

> A considerable volume of milk of Maryland-Virginia members can be shifted from surplus to Class

> I and II use. This will mean, under current conditions, an increase in value of such milk of approximately $3 per hundredweight.

On this basis, Hirsch concluded that the Association's purchase of Embassy at the contract price would afford "an unusual opportunity to increase average returns to members through purchase of the Embassy milk distributing business" (*ibid.*, R. 717).

These predictions, coupled with the fact that they came true, make ridiculous the Government's assertions that the Association acquired Embassy for "considerations other than . . . profits" and that it was "willing and eager" to overpay "without regard for the actual earnings of the business" (Gov. Br. 36). The computations offered to show that the acquisitions caused "substantial operating losses" to the Association amounting to $1,362,000 in the first two and a half years of Embassy's operation by the cooperative (Gov. Br. 36 n. 17) are positively astonishing in light of the unqualified admission by the Government's own accountant, who prepared the very data relied on (Gov. Exh. 87, R. 628), that he had neglected to "take into account the fact that the Association moved from 16 to 18 thousand gallons of milk [daily] from the Class III price of $3 into the Class I price of $6.62" (R. 295, 576). The overwhelming significance of this omission was pointed up by the president of the Association who testified without contradiction that (R. 360)

> by moving Class III milk into Class I channels by means of the operation of the dairy it meant an increased income of a million or a million and a half dollars a year. So it definitely, from the standpoint of the organization as an integrated operation, was a good proposition . . .

Thus, instead of losing over $1,300,000, as claimed by the Government, the Association made several million dollars in the integrated operation of Embassy.

Against this background, the district court's correct finding that the Association paid considerably more than "the actual and instrinsic value of the property purchased" (R. 491) is far removed from any finding or implication that the purchase price was unreasonable, or that it in any way exceeded the value of Embassy to its farmer purchasers as a Class I outlet for their surplus milk. The court's finding, as the Government has indicated (Gov. Br. 8), was limited to a comparison of the purchase price with Embassy's tangible assets. In fact, the court deemed irrelevant evidence that in acquiring Embassy Dairy the Association secured not simply the normal business of a distributorship but the additional profits that its farmer-members would realize from selling approximately 20,000 more gallons of milk daily at the much higher Class I and Class II prices (R. 295-97; compare Gov. Br. 36).

Moreover, the court's finding, being limited to the tangible assets transferred, gave no weight to the non-competitive agreement by which Embassy's former owners agreed to stay out of the Washington market for ten years. This ancillary covenant was of great value in achieving the Association's purpose of marketing more of its members' milk in the higher price classifications, for immediate re-establishment of Embassy's former owners in the Washington market would necessarily have diluted the benefits of the Embassy purchase. For the Association to have failed to secure such a covenant would have been an omission

of considerable imprudence even by ordinary business standards. Since the landmark decision in *United States* v. *Addyston Pipe and Steel Co.*, 85 Fed. 271 (6th Cir. 1898), such restrictive covenants have been universally acknowledged to be necessary and lawful when ancillary to the *bona fide* sale of a business. The Government made this very point in its Brief in Opposition to Motion to Dismiss in Part, at page 5. There is no lesser need for such lawful protection in the case of a farmer cooperative's purchase of a business. In fact, the Farmer Cooperative Service expressly advised dairy cooperatives, several months prior to the Embassy acquisition, to take into consideration when purchasing a milk distributing business the effect on "the values of intangible assets" of the question:[6]

> Will the seller agree to refrain from engaging in milk distribution in the area for some specified period of time of reasonable length?

[6] Hirsch, *Estimating the "Market Value" of the Milk Distributing Business*, Farmer Cooperative Service General Report 3 (April 1954), pages 27-8. The same publication counseled dairy cooperatives contemplating the purchase of a distributorship to inquire: "Would purchase of the business provide additional marketing opportunities? (For example, the purchaser might then be able to participate in a market-wide pool resulting in higher average prices each year to its producers. In the case of a dairy manufacturing organization, purchase of the business might provide a means of entry into milk distribution and perhaps a chance to increase returns to producer-patrons. In addition to the chance to use some of its own qualified milk in high-return bottled products, the purchasing organization might add sales outlets for distribution of its manufactured dairy products)" (*id* at 32). They were also advised to examine the "competitive situation" and determine "How prevalent are established discounts? Uneconomic price cutting? (These directly affect opportunities for realizing operating savings)" (*id* at 31).

The Government's characterization of the non-competitive agreement between buyer and sellers here as a "conspiracy" in no way alters its reasonableness, its ancillary nature or its legality, and the district court made no finding whatever to the contrary.

The mere fact that after the acquisition the Association supplied all of Embassy's fluid milk requirements does not mean that the independent producers who formerly shipped to Embassy were excluded or foreclosed from the market. As conceded by the Government, these producers were welcome to join the Association: "it would have been pleased to take them under their wing" (R. 137). More than one third did join the Association, and another third found other outlets in the Washington market (Gov. Exh. 88, R. 629). And the general manager of the Association testified that the Association was willing to buy milk from nonmember producers (R. 390). The record is empty of any evidence that the Association sought to exclude any farmer from the Washington market.[7] There is no showing that even one producer complained of injury or foreclosure or that even one producer was refused membership in or service by the Association. In fact, not one of the former Embassy shippers was

[7] The Government's charge of "exclusion" is based entirely on charts and tables showing where the former Embassy suppliers went after the acquisition (e.g. Gov. Exh. 88, R. 629; see Def. Exh. 56, not printed). The district court found no exclusion. The only finding it did make, that producers were "unable" to find an outlet in the market unless they joined the Association, is without foundation in the record, and is expressly contrary to the response, quoted in the text above, which the court itself elicited from the Association's manager.

called as a witness at trial.[8] Moreover, although the Government asserts that Capper-Volstead does not permit a cooperative to tie up outlets so that producers must either join the Association or market through it, its support for this assertion consists entirely of two highly misleading, out-of-context statements on the floor of the Senate (Gov. Br. 31 n. 13).

Both of the statements relied on by the Government were made during the debate on Senator Walsh's proposed amendment to require Capper-Volstead associations to admit any qualified producer to membership. Senator Kellogg, who opposed the amendment, declared "I do not think that one organization should be required to take everybody into its fold." Immediately thereafter he asserted that nonmembers of a producers association "ought to be allowed to stay out and to sell their products individually or collectively or in any way they please" (62 Cong. Rec. 2267). The Government relies on the latter statement, although the full context makes clear that Senator Kellogg was speaking only of the right of associations to exclude producers from membership. The statement attributed to Senator Walsh is even more misleading. It was the essence of his argument that the Capper-Volstead bill vested such great power in producer cooperatives that his amendment should be adopted. After acknowledging that under the bill as it stood (and as ultimately enacted) farmers were free to organize "20 different associations," he went on to the explain the reasons for

[8] The absence of any testimony from persons in the best position to know whether there was any injury or exclusion of producers "is itself persuasive that their testimony, if given, would have been unfavorable" to the Government. *Interstate Circuit* v. *United States*, 306 U.S. 208, 226 (1939).

his proposed amendment. This explanation, which immediately follows the language quoted by the Government, makes plain that Chairman Walsh understood that Capper-Volstead, if enacted, would empower cooperatives to exclude independent producers from the market. He said:

> Senators will bear in mind that the bill as they are asked to give it their approval authorizes the farmers to go so far with their organization and to get so many producers in it as to constitute a monopoly of the particular product in which they are interested, so that all other producers of that particular community will be obliged to leave the field. As in the case of the raisin growers, those who are left outside of the monopolistic organization may constitute a mere modicum and they will have no way of getting their products on the market at all. If they do not want to organize a separate association or if they are so few in number that they can not do so profitably they ought to be permitted to come into the monopolistic organization upon exactly the same terms as their neighbors are admitted to membership. It ought not to be placed in the power of this monopolistic organization to drive out of existence and out of the business in which they are engaged the men who do not happen to come in until the association embraces a sufficient membership to constitute a monopoly of the business. If should be borne in mind, Mr. President, that it is proposed to give them the power to organize until they have a sufficient membership to enable them to control the market and have no competitor whatever. Of course, if they care to exercise the power, then they can kill off every other man who is engaged in the same business and who has to market in the same place. 62 Cong. Rec. 2268, see Assn. Br. App. 42a-43a.

The Walsh amendment was defeated (*ibid.*). Neither in debate on this amendment, nor elsewhere, did proponents of Capper-Volstead dispute Senator Walsh's interpretation (see Assn. Br. 55-57).

In short, the evidence showed that the Association paid a reasonable price for a distribution outlet that was to enhance and did enhance the value of 2000 farmers' surplus milk; that the covenant not to compete signed by Embassy's sellers was wholly in accord with ordinary business practice; and that membership in the Association or a market for their milk was offered to the farmers who had been supplying Embassy. The acquisition furthered the collective-marketing purposes of the cooperative and was not even alleged to have unduly enhanced prices to the public. This is precisely what the Capper-Volstead Act, the Agricultural Marketing Act, the Farmer Cooperative Service of the Department of Agriculture, the Baltimore Bank for Cooperatives and Congress always intended.

C. The Government's New Borden Argument

According to the jurisdictional statements in these cases, the parties were in substantial agreement that *United States* v. *Borden Co.*, 308 U.S. 188 (1939), was not "fully determinative" of the issue whether farmer cooperatives "not acting in combination or conspiracy with outsiders" were exempt from prosecution for monopolization (Gov. Jur. St. No. 73, p. 9; see Assn. Jur. St. No. 62, p. 13). In its brief on the merits, however, the Government now rereads *Borden* as being "dispositive" of the identical issue (Gov. Br. 25).

The attempt of the Government to read into *Borden*, a case of conspiracy with outsiders, an implicit determination of the issue of monopolization by a Capper-

Volstead cooperative acting alone, is no more valid than was the attempt by Nashville Milk Co. to read into this Court's decisions in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954), and *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947), implicit holdings that Section 3 of the Robinson-Patman Act was a civil damage statute. (Brief of Nashville Milk Co., petitioner, No. 67, October Term, 1957, at 21-22). See *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373 (1958). By stretching *Borden* beyond the issues presented to or considered by this Court, the Government would convert a sound limitation on the exemption of farmer cooperatives into a complete repeal of the exemption and a negation of its accompanying procedure.

With regard to the charge of monopolization under Section 2 of the Sherman Act, the Government suggests that a cooperative whose "control over supply or price" is "obtained by excluding non-member producers from the market, by predatory pricing to achieve this end, or by combining with others" (Gov. Br. 13) transcends the authorization of Section 1 of the Capper-Volstead Act. We do not dispute that under *Borden*, "combining with others" exceeds the authorization of Section 1, but concerning the Section 2 charge there is neither evidence nor allegation of any such conduct by the Association. Unilateral action by a cooperative, whether to exclude others, to sell or not to sell its product, to price arbitrarily or to buy a distribution outlet (Gov. Br. 31-32) was not involved in and is not controlled by *Borden*. "Coercion," "leverage," "anticompetitive intent" and "exclusion" are allegations which, if *Borden* were extended to unilateral action, can rest on the mere existence of the power in-

herent in a combination of most of the farmers in the market. (See Assn. Br. 91 *et seq.*) Any vertical integration, whether by acquisition or construction, will lessen the cooperative's dependence on other dealer outlets and may subject it to charges of "boycotting" and "refusals to sell". (Gov. Br. 32). Any lowering of the cooperative's prices can be charged as "predatory" (*ibid.*). Antitrust prosecutors would have a field day, as the Government's brief so well illustrates, if they could seek indictments for monopolization on the basis of the activities of a Capper-Volstead cooperative acting alone.

With regard to the Sherman and Clayton Act charges against the Association's acquisition of Embassy, the Government urges a different application of *Borden*. It suggests that Section 1 of the Capper-Volstead Act contains its own limitation since the word "necessary," which appears in the authorization of cooperatives to "make the necessary contracts and agreements," really means "lawful." See e.g. Gov. Br. 27, 38. Such an interpretation, if accepted, would render the entire authorization meaningless, for no corporation or association needs an act of Congress to permit it to make lawful contracts. If a contract is "necessary" to carry out the anticompetitive purposes for which cooperatives were created, that word cannot be construed as an invitation to antitrust prosecutors to allege that a contract to purchase marketing facilities was equivalent to a "conspiracy" (Gov. Br. 27) within the meaning of *Borden*.

In our view, the *Borden* case sets forth the only reasonable test for applying the antitrust laws to cooperatives. That test would subject the Association to Sherman Act prosecution if the charge were that it

combined or conspired with outsiders to achieve common domination or control of the market. The Government's complaint as originally filed made no such allegation. The Amended Complaint, however, did charge that the Embassy transaction was a "conspiracy" under Sections 1 and 3 of the Sherman Act; but no evidence was ever offered, and no such finding was made (Assn. Br. 28-30).[9] The district court's ruling against the Association under Section 3 of the Sherman Act in the absence of proof by the Government of a competitive advantage to the other party to the transaction, i.e. the sellers of Embassy, was based on the theory that such proof was unnecessary (R. 505) and that the Association's unilateral conduct in its own self-interest was amenable to antitrust standards because an outsider was involved in the transaction. Compare *Hutcheson* v. *United States*, 312 U.S. 219 (1941).

The Government's proposed application of *Borden* would also emasculate the procedural provisions of Section 2 of the Capper-Volstead Act. That section is portrayed as if it did no more than establish discretionary administrative price regulation over cooperative monopolies (Gov. Br. 13, 25). Section 2's command that the Secretary of Agriculture "shall" institute action against suspected cooperatives is misread as if it confers discretion, as if it merely "per-

[9] The Government's brief makes passing reference to the support by other dealers of the Association's acquisition of Embassy (Gov. Br. 10). The fact is that the Government's complaint alleged no participation by other dealers in the acquisition (R. 18-21), the court made no finding thereon (R. 480, 504), and the only testimony at trial relating to the views of other dealers was given by the Association's manager who testified that he did not discuss with any distributor in the Washington market the proposed acquisition by the Association of Embassy Dairy (R. 387-388).

mits" the Secretary of Agriculture to proceed (Gov. Br. 13). The procedure is described as an ordinary "administrative proceeding" (Gov. Br. 13), one which "simply makes provision for corrective administrative action" (Gov. Br. 25). The range of equitable Sherman Act remedies available against cooperatives in district court, but unavailable in the enforcement of orders of other administrative agencies, is wholly ignored. Compare Assn. Br. 48-50. Instead, the role of the Department of Justice in Capper-Volstead Act enforcement is depicted as that of an errand boy whom the Secretary of Agriculture may send into a district court simply to seek affirmation of his Section 2 order (Gov. Br. 21). By describing district court jurisdiction as if confined to "enjoining violation of the Secretary's order," or "modifying or setting aside the order" (Gov. Br. 21), the Government passes over the critical provision in Section 2 which empowers the district court to "enter such other decree as the court may deem equitable" in enforcing the Secretary's order "against monopolization or restraint of trade"—a provision designed to permit the court to "apply any remedy against that particular monopoly and restraint of trade that it could now apply under the Sherman Act" (62 Cong. Rec. 2167, Assn. Br. App. 40a). *Borden* never reached these provisions.

We agree with the Government that the problem in this case, as in *Borden* and *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797 (1945), is to determine how far Congress intended "to neutralize the results envisioned" by the antitrust laws (Gov. Br. 28). We believe that the conspiracy test applied in those two cases—involving farmer cooperatives and labor unions—governs here, and that the fact that the test

may be asserted to "bring about a wholly undesirable result," one which leaves the exempt organization "free to engage in conduct which restrains trade," 325 U.S. at 810, affords no reason for judicial repeal of the exemption. As so aptly stated by this Court in the *Hutcheson* case (312 U.S. at 232):

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

This Court's opinion in *Allen Bradley* reaffirmed *Hutcheson*, italicized the language of *Borden* that conspiracy "*with other persons*" (325 U.S. at 808) had been the touchstone of violation, and made it clear that exemption was to be forfeited only where unions "aid non-labor groups to create business monopolies and to control the marketing of goods and services." 325 U.S. at 808. Thus, whether or not exemption is to be accorded does not depend on whether the exempt organization's activities are considered desirable or undesirable, but "means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." 325 U.S. at 810. In a companion case, *Hunt* v. *Crumboch*, 325 U.S. 821 (1945), exemption was upheld despite the fact that the union's boycotting activities completely excluded a trucking company from doing business in the market. And in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 557-60 (1939), this Court sustained the "competitive advantages" accorded to farmer cooperatives by a

federal marketing order despite the charges that "coercive tactics" and "ulterior motives of corporate aggrandizement" characterized the cooperatives' efforts to secure a "monopoly of the market."

In short, the element of conspiracy was by no means incidental to the holding in *Borden*. To the contrary, conspiracy with outsiders has been the essential ingredient of each decision of this Court in which a farmer cooperative or a labor union has been held to have forfeited its statutory exemption. If unilateral action in restraint of trade by a farmer cooperative is to be subjected to antitrust prosecution, it is Congress and not this Court that should be asked to amend or repeal the existing exemption accorded by the Capper-Volstead Act.[10]

II. THE DISTRICT COURT'S JUDGMENT GRANTS FULL AND ADEQUATE RELIEF

The Government urges that in the event this Court holds the Association to be subject to conventional antitrust enforcement, the judgment entered by the district court should be modified because it "fails to provide sufficient safeguards to insure a divestiture which will result in establishment of an effectively competing independent dairy" (Gov. Br. 47). The judgment itself

[10] The Government also argues (Gov. Br. 38-45) that the last paragraph of Section 7 of the Clayton Act did not "broaden the existing antitrust immunity of agricultural cooperatives under Capper-Volstead" (Gov. Br. 45). We agree. As demonstrated by our principal brief, the inclusion of the Secretary of Agriculture in the last paragraph of Section 7 by its 1950 amendment simply recognized and reaffirmed cooperatives' 1922 Capper-Volstead exemption (Assn. Br. 65-71). The Government's description of how the Secretary came to be included in the 1950 amendment parallels our own and discloses no alternative statutory reference to account for the language of the amendment.

(R. 85-87) is the best refutation of the Government's contention. The Association is ordered to dispose of "as a unit and as a going dairy business all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, and replacements therefor" (¶ 4). The divestiture must be carried out "in good faith" and requires prior approval of the district court (¶ 5). The Association must report its efforts to effect the divestiture to the court within 60 days of the effective date of the judgment, every 90 days thereafter and "on such other dates as [the] Court may order" (¶ 5). Pending divestiture the Association must "administer the assets acquired from Embassy Dairy, Inc., and replacements therefor in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible, ordinary wear and tear excepted" (¶ 6). The court retained jurisdiction to enable either party to apply for further orders and interpretations of the judgment, and "for the enforcement of compliance therewith and punishment of violations thereof" (¶ 8).

Remarks by the court in the hearing on relief explain and amplify the above provisions. At the outset, the court declared that it intended "to order divestiture of the assets of Embassy Dairy—of course, a complete divestiture, a bona fide divestiture—and a cancellation of the auxiliary contracts". (R. 507). The court carefully considered all contentions and questions raised, indicated the intended application of the judgment to hypothetical situations, and assured the Government that it (R. 534):

> always put a very broad construction on the words, "good faith." And any time the Government finds anything not done in good faith, you just make an

> appropriate application to the Court, and I will entertain it sympathetically.

Furthermore, the court stressed repeatedly that it retained jurisdiction, so that the Government could apply to the court for such additional relief as the circumstances warranted (see e.g. R. 517, 527, 529, 536).

This Court has always recognized that district courts "are vested with large discretion to model their judgments to fit the exigencies of the particular case," *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947), and it has refused to "direct a recasting of the decree except on a showing of abuse of discretion." *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185 (1944). Moreover, it has been particularly reluctant to intervene where, as here, the district court has retained jurisdiction. Thus, in *Associated Press* v. *United States, supra*, where the Government, as here, sought a broadening of the decree entered in its favor, this Court observed:

> If, as the government apprehends, the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers, the Court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out.

See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 157 (1951); *International Salt Co.* v. *United States, supra*, 332 U.S. at 401-402. Here, similarly, if the Government's apprehensions should be realized the court could readily take necessary measures to assure that Embassy would be restored to the market as an effectively competing independent dairy. The

terms of the decree and the court's remarks leave no doubt that this would be done.

Analysis of the specific modifications proposed by the Government shows that they go far beyond the Government's purported objective of insuring "establishment of an effectively competing independent dairy."

(a) *Assets To Be Divested*

The Government urges that the district court erred in describing the assets to be divested as including only those assets "which it acquired on July 26, 1954, and replacements therefor" (Gov. Br. 47). It contends that the judgment should be rewritten to require the Association to divest all assets used, as of the date of disposition, in the dairy business conducted under the trade name "Embassy Dairy," including assets acquired by the Association from the Richfield-Wakefield Dairy. Thus, although the Government does not challenge the district court's holding that the Richfield-Wakefield acquisition was lawful (Gov. Br. 11 n. 9), it nevertheless seeks to nullify that holding indirectly.

It is the essence of the Government's position that failure to provide for divestiture of all assets presently used in the Embassy operation may make it possible for the Association to divest an outmoded, antiquated, and competitively insignificant Embassy Dairy, stripped of modern machinery and other assets added in the five years since 1954. It seems plain that any attempt by the Association along these lines would be doomed. Thus, the court noted that if, for example, the Association "bought new milking machines, or something of that sort, [o]f course, that is

part of the business" (R. 536).[11] And, when Government counsel suggested that "Embassy can be allowed to run down hill," the court replied, "They must administer the assets in good faith as a going dairy concern" (R. 527). On the other hand, the modification which the Government seeks would deprive the Association of the use of lawfully acquired assets which it used in expanding the Embassy operation—in part to serve Richfield-Wakefield business—but which are by no means indispensable to its operation as a going, competitively significant dairy business. The district court considered hypothetically the question whether Richfield-Wakefield trucks impressed into use for the purpose of expanding, rather than merely for maintaining, the Embassy business should be divested. It concluded that such trucks should not "be comprehended by this divestiture" (R. 533). The Federal Trade Commission has likewise ruled that a divestiture order in a merger case need not "require the divestiture of all such assets added to the property by the respondent if the divestment may be otherwise accomplished without destroying the operating condition and organization of the acquired mill, substantially as it existed at or around the time of the acquisition." *In the Matter of Crown Zellerbach Corp.*, 1958 CCH Trade Reg. Rep. ¶ 26,923, p. 36,462.

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[11] The Government states that the court declined to rule whether the judgment would require divestiture of new equipment purchased by the Association and used in the Embassy operation (Gov. Br. 48). Actually, the court declined to "give an advance interpretation" with respect to a specific item of equipment which Embassy had purchased "because the situation will be governed by detailed facts existing at the moment." As the court said, to rule in advance on a situation that might depend on specific facts would have been "rather improvident and perhaps almost injudicial . . ." (R. 537).

(b) *Operation of Another Dairy*

The Government contends that the judgment should have prohibited the Association from operating any dairy other than Embassy pending divestiture and for an unspecified period thereafter (Gov. Br. 49). The Government expresses concern that the decree does not adequately guard against pre-divestiture impairment of Embassy (Gov. Br. 49). This fear is explicitly laid to rest by the judgment itself. The Association is required prior to divestiture to administer the Embassy assets and replacements "in good faith as a going dairy business" (¶ 6) and to dispose of them "as a unit and as a going dairy business" (¶ 4), under continuing court supervision to insure good faith compliance (¶ 8). Any attempt to siphon off the Embassy Dairy assets to another dairy operated by the Association prior to divestiture would clearly be subject to these provisions. Indeed, Government counsel asked specifically whether the defendant would have a right to say: "We are going to break out the Wakefield part of this business and we will designate this as an account that you, Wakefield—or whatever the name shall be—shall solicit." To this the court replied, "I think that is all covered by the good faith provision," adding that the court "always put a very broad construction on the words, 'good faith'" (R. 534). As the court observed, the Association is bound to maintain Embassy "as a going dairy business . . . If you find any lack of good faith, all you have to do is to make an application at the foot of the decree" (R. 527).

The Government also urges that the district court should have enjoined the Association from operating Richfield-Wakefield or any other dairy for an unspeci-

fied period after divestiture. Such a prohibition would seriously impair the Association's statutory right to market its members milk, without requiring any showing whatever that the Association's re-entry into the milk distribution business would adversely affect competition. Limitations of this character obviously depend on the evidence presented to the court; yet at the hearing below the Government neither presented nor offered any evidence whatsoever to justify the injunction. In the absence of a strong showing of necessity, it would have been an abuse of discretion for the trial court to have included such a drastic prohibition. Cf. *United States* v. *National Lead Co.*, 332 U.S. 319, 353 (1947).

Moreover, the Government's effort to insulate Embassy from competition after divestiture ignores the facts, fully understood by the district court of the highly competitive character of the dairy business in Washington. Many firms, representing 90 per cent of the distribution market (Gov. Exh. 120, Table T, R. 686), presently confront Embassy and will continue to confront Embassy, by whomsoever owned, with persistent efforts to capture its customers. In short, the judgment assures total divestiture of a going business, but quite properly does not go so far as to attempt to provide a sanctuary from competition.

(c) *Injunction Against Future Acquisitions*

The Government contends that the judgment should be rewritten so as to prohibit the Association from acquiring any milk business in the Washington market "without (a) prior notice to the United States and, if it objected, (b) approval of the acquisition by the

court upon a showing that it would not substantially lessen competition or tend to create a monopoly in the sale or distribution of fluid milk in that market" (Gov. Br. 50). Such a prohibition is utterly unwarranted. Should this Court hold that the Association is amenable to suit under Section 7 of the Clayton Act, the Government can invoke that statute whenever an acquisition by the Association has the proscribed effects on competition. The Government advances no valid reason either for shifting the burden of proof to the Association or for requiring prior notice. While the Government blandly asserts that "the record in this case demonstrates the difficulty of undoing a consummated acquisition in the dairy business" (*ibid.*), it points to nothing in the record supporting this assertion. We submit that, in fact, the record demonstrates that the Association has operated Embassy as a separate division and, if finally ordered to do so, can dispose of Embassy as a fully operating, competitively significant, going dairy business. Moreover, the Government's concern that the Association will be unable to find a purchaser for Embassy if the Association is permitted to re-enter the market is entirely speculative and premature. The court retains jurisdiction and should such difficulty arise could make appropriate modifications in light of the actual circumstances existing at the time.

This case is vastly different from *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), or *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948), on which the Government relies. The trial in those cases established unlawful acquisitions as the "pattern of past conduct." *United States* v. *Crescent Amusement Co.*, 323 U.S. at 186. The Government relies

on no such pattern here.[12] At the hearing on relief, the district court made this very distinction, and counsel for the Government agreed "that a single transaction is here involved . . ." (R. 515). There is no warrant in the record, no proffer of evidence, no precedent in decisions of this Court for requiring a district court to impose an antitrust straitjacket on a party who has been found to have made but a single unlawful purchase. See *United States* v. *Bethlehem Steel Corporation* (Civil Action No. 117328, S.D.N.Y.) where similar relief was sought by the Government but denied in the unreported judgment of December 19, 1958.

(d) *Visitation Rights*

The refusal of the district court to grant broad visitation rights over the books, records, personnel and affairs of the Association will not impair the Government's ability to determine compliance with the divestiture decree. The Government asserts that while denial of visitation rights might be proper as an exercise of the court's discretion, the court erred here in basing its denial on the ground that visitation rights are comparable to an unlawful search and seizure. The district court, however, was under no illusion that the Fourth Amendment in any way precluded it from granting such rights where appropriate or necessary to assure compliance. The court recognized that it had "discretion to include such a provision," but declined to exercise it (R. 518). In the circumstances presented, this was not an abuse of discretion. The district court believed that compliance could adequately be assured by scrutiny of the reports which the Association is

[12] Brief In Opposition to Motion To Dismiss in Part, page 6.

required to file every 90 days and "on such other dates as [the] Court may order" (¶ 5), and by the assurance given to Government counsel that:

> If there is any reason for examining books and papers, you may make an application at the proper time to this Court at the foot of the decree (R. 517).

Such a procedure for supervising the faithful execution of a judgment squarely accords with the rulings of this Court. *Associated Press* v. *United States*, *supra*, 326 U.S. at 22-23; *Lorain Journal Co.* v. *United States*, *supra*, 342 U.S. at 156-157.

It does not appear that the Government any longer presses for the provision sought in its proposed judgment (R. 83) under which it could require the Association "to submit such reports in writing under oath . . . as may from time to time be necessary to the enforcement of this Judgment." In any event, in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 718, n. 3, 728 (1944), this Court expressly held that a substantially identical provision was "too indefinite for judicial enforcement and therefore improper."

CONCLUSION

For all of the foregoing reasons we respectfully urge that the judgment of the district court in No. 62 be reversed and the judgment in No. 73 be affirmed.

Respectfully submitted,

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